

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**MOTION FOR LEAVE TO FILE MOTIONS IN LIMINE
UNDER SEAL AND MOTION FOR PERMISSION TO FILE SUCH MOTIONS
IN EXCESS OF TWENTY PAGES**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, respectfully requests that this Honorable Court (1) permit Mr. Fariz to file certain motions in limine under seal with service on the other parties, and (2) pursuant to Local Rule 3.01(c), permit the filing of these motions in excess of twenty pages. As grounds in support, Mr. Fariz states:

1. Counsel for Mr. Fariz are in the process of researching and drafting motions in limine seeking to preclude the government from offering at trial evidence that has been produced to the defense, based on the Fifth and Sixth Amendments to the U.S. Constitution and the Federal Rules of Evidence.

2. Some of these motions in limine pertain to communications intercepted through the Foreign Intelligence Surveillance Act ("FISA") and documents and other evidence produced from the Israeli government. Each of these categories of discovery are protected by the Court's Protective Orders. The Court has issued a Protective Order governing "all declassified recorded conversations, messages and facsimiles, and any

summaries or transcripts thereof, which were a product of FISA-authorized interceptions. . . .” (Doc. 270 at 1). The Court has also issued a Protective Order concerning certain materials from the Israeli government, “including medical reports, autopsy reports, bomb technician reports and related photographs taken during the investigation of bombings and alleged terrorist attacks in Israel.” (Doc. 485 at 1). Both of the Protective Orders provide that the orders do not “restrict in any way the right of the defense to use the FISA intercepts in connection with any pleading or proceeding in this case.” (Doc. 270 at 2; *accord* Doc. 485 at 3). The Protective Order governing the use of certain Israeli evidence further provides that materials that “contain highly personal information about the victims of the bombings and alleged terrorists attacks, such as their medical reports, autopsy reports, and related photographs, which are necessary to be filed with the court shall be filed with the court under seal.” (Doc. 485 at 3).

3. Mr. Fariz seeks to file motions in limine that pertain to and describe (a) FISA intercepts, and (b) Israeli documents and other related evidence (including but not limited to materials governed by the Protective Order), under seal with service on the other parties.¹ Filing such motions in limine under seal will protect the individual privacy rights and

¹ Mr. Fariz includes within this second category all evidence from the Israeli government or evidence concerning or relating to the alleged attacks in the Middle East, including, for example, any evidence relating to simulated bombings. Mr. Fariz does not, however, include within this request motions that only generally describe evidence at issue, such as summaries of evidence alleged in the superseding indictment. Such motions will be filed in the public record. Alternatively, Mr. Fariz would request that he be permitted to file two sets of motions in limine regarding FISA and Israeli materials: (1) an unredacted motion filed under seal with service on the other parties, and (2) a redacted motion filed in the public record.

interests sought to be safeguarded by the protective orders. In particular, the Protective Order governing the FISA intercepts serves to protect the privacy interests of those individuals whose communications were intercepted from further unnecessary dissemination. The Protective Order governing the Israeli documents was based on the concern for the privacy interests of victims and their families. That Protective Order already requires the parties to file motions concerning certain Israeli evidence under seal.

4. Mr. Fariz additionally seeks this relief based on the extensive pretrial publicity of this case and the fact that the juror questionnaires have already been completed, meaning that individuals know that they are potential jurors. The purpose of the motions in limine is to avoid jurors hearing evidence that is irrelevant, prejudicial, or otherwise fails to conform to constitutional rights and evidentiary rules. Mr. Fariz therefore seeks to file these motions under seal to avoid the risk of potential jurors becoming exposed to purported evidence that the Court may find should be excluded, and thereby jeopardizing Mr. Fariz's right to a fair trial. *See United States v. Noriega*, 917 F.2d 1543, 1547-49 (11th Cir. 1990) (discussing court's "broad discretion to balance First Amendment interests with a criminal defendant's Sixth Amendment right to a fair trial," and reiterating that "*Sixth Amendment rights of the accused must be protected always.*") (emphasis in original; citations omitted); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) ("[T]he trial judge had the duty of determining which exhibits were entitled to come into evidence. The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not

yet in the public domain.”)²; *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (“Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.”). Mr. Fariz would note, for example, that each of the pleadings filed in this case is readily available on the Court’s web site, and that some evidence has already been displayed during senatorial campaign ads and on local web sites. The pervasiveness of the pretrial publicity is reflected in many of the completed juror questionnaires. Mr. Fariz therefore has specific concerns regarding any pretrial publicity of evidence that the Court deems is not admissible at trial.

5. Accordingly, Mr. Fariz submits that, if any party asserts a First Amendment interest, this Court should specifically find that: “1) there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by the publicity; 2) there is a substantial probability that closure would prevent that prejudice; and 3) reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” *Noriega*, 917 F.2d at 1549 (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986)).

6. Counsel for Mr. Fariz are contemplating filing separate motions in limine that address different evidentiary issues. Mr. Fariz also respectfully requests permission to file

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

motions in limine that either individually or collectively exceed twenty pages, in light of the large volume of discovery that will be addressed. Local Rule 3.01(c).

7. The undersigned contacted Assistant United States Attorney Terry Zitek who indicated that the government takes no position on this motion.

WHEREFORE, Defendant, Hatem Naji Fariz, respectfully requests (1) permission to file certain motions in limine under seal, and (2) permission to file said motions, individually or collectively in excess of twenty pages.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender